Supreme Court, U. S.
FILED
NOV 2 1978
MICHAEL RODAK, JR., CLERK

No. 78-178

In the Supreme Court of the United States

OCTOBER TERM, 1978

ARCHIBALD MAULDING and HARRY D. RIMBEY,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-178

ARCHIBALD MAULDING and HARRY D. RIMBEY,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners seek review of the decision below holding that they willfully failed to pay over taxes withheld from the wages of their corporation's employees within the meaning of Section 6672 of the Internal Revenue Code of 1954 so as to be personally liable for the taxes not paid over.

The pertinent facts may be summarized as follows: Petitioners, together with MacDonald Pine, were the sole shareholders, directors and officers of Pine and

Company, a corporation engaged in landscaping in Illinois. For the last three quarters of 1968 and the first quarter of 1969, Pine and Company withheld income and social security taxes from its employees, filed the quarterly returns required, but failed to pay most of the withheld taxes over to the United States, as required by law[1] (Pet. 2-3; Pet. App. A 2a-3a). See 26 U.S.C. 3102(a), 3402(a) and 3404. Pine and Company maintained three checking accounts: a general account was used to pay creditors, and was the account from which taxes were paid. Only petitioners and Pine were authorized to draw checks on the general account. It was stipulated that petitioners and Pine signed checks in payment of creditors other than the United States at various times throughout the quarters at issue. The evidence showed that both petitioners were aware of the poor financial condition of Pine and Company during the pertinent quarters (A. 87-88, 90, 105, 151, 235, 241)[2] and that they both were aware of the withholding requirements and knew that withheld taxes were required to be paid over to the government (Pet. 5; Pet. App. A 2a-5a).

---

[1] After unsuccessfully attempting to collect the withheld taxes from Pine and Company, the Internal Revenue Service assessed the taxes at issue against petitioners and Pine under Section 6672. Thereafter, those parties instituted this refund suit in the United States District Court for the Southern District of Illinois. Although Pine was a party in the courts below, he has not joined in the petition for certiorari.

[2] "A." refers to the record appendix filed in the court of appeals.

At the close of petitioners' evidence, the district court directed a verdict that they were responsible persons with respect to Pine and Company within the meaning of Section 6672. The only question submitted to the jury was whether petitioners' failure to pay over the withheld taxes was "willful." The district court instructed the jury that mere negligence does not make conduct willful. However, it further stated that " '[w]illfulness' also includes a reckless disregard for obvious or known risks and failure to investigate or correct mismanagement after having actual notice of circumstances which, if investigated, would have disclosed that the withholding taxes had not been paid to the Government" (Pet. App. B 8a). In response to special interrogatories, the jury found that petitioners had acted willfully and the court held petitioners and Pine jointly and severally liable for $81,466.95 (Pet. App. A 5a). The court of appeals affirmed. It held "that willfulness [within the meaning of Section 6672] requires either an intentional failure to pay over the withholding taxes or conduct evincing a wreckless [*sic*] disregard as to whether the amounts due to the government were paid or not" (Pet. App. A 5a).

1. The decision below correctly held that petitioners were personally liable under Section 6672 for the unpaid withholding taxes of their corporation.

Petitioners' sole contention is that the trial court erred in instructing the jury that willfulness within the meaning of the statute includes a reckless disregard for obvious or known risks. But the courts of

appeals have uniformly held that willful conduct for purposes of Section 6672 "may also indicate a reckless disregard for obvious or known risks." *Monday* v. *United States*, 421 F.2d 1210, 1215 (7th Cir.), cert. denied, 400 U.S. 821 (1970). Accord: *Teel* v. *United States*, 529 F.2d 903, 905 (9th Cir. 1976); *Bolding* v. *United States*, 565 F.2d 663, 674 (Ct. Cl. 1977); *Burack* v. *United States*, 461 F.2d 1282, 1291-1293 (Ct. Cl. 1972).

Contrary to petitioners' assertion (Pet. 8), the decision below does not conflict with *Kalb* v. *United States*, 505 F.2d 506 (2d Cir. 1974), cert. denied, 421 U.S. 979 (1975). There, the court rejected the government's argument that a corporate officer acts "willfully" for purposes of Section 6672 when he should have known that taxes owed were not paid. In the Second Circuit's view, conduct amounting to no more than negligence is not willful under Section 6672. But as petitioners acknowledge (Pet. 13), the court in *Kalb* expressly approved the statement in *Monday* v. *United States*, *supra*, that willful conduct " 'may also indicate a reckless disregard for obvious or known risks' " (505 F.2d at 511). Hence, the jury instructions that were approved by the court of appeals are entirely consistent with the definition of willfulness adopted by the Second Circuit in *Kalb*.

Petitioners argue (Pet. 19) that the district court improperly introduced the element of negligence into the definition of willfulness of Section 6672. But the district court did not charge the jury that it could conclude that petitioners' conduct was

willful if it determined that petitioners should have known that the withholding taxes had not been paid over to the government. Indeed, the trial court specifically instructed the jury that "[m]ere negligence or simple carelessness due to preoccupation does not make conduct willful or amount to knowledge" under Section 6672 (Pet. App. 8a). However, the court further instructed that a responsible officer may not escape liability by purposely closing his eyes to facts which would have put him on notice as to the corporation's default, and that willfulness includes a reckless disregard for obvious or known risks. It is this type of conduct that the courts have described as the voluntary, conscious and intentional preference of other creditors over the United States. The court of appeals therefore correctly concluded (Pet. App. 5a) that "the instruction comports with the definition of willfulness established in *Kalb* v. *United States*, *supra*, *Teel* v. *United States*, *supra*, and *Monday* v. *United States*, *supra*." [3]

---

[3] Petitioners further rely (Pet. 13-15) upon the definition of willfulness for purposes of the criminal tax provisions of 26 U.S.C. 7201-7215. But it is well settled that the personal liability imposed by Section 6672 is civil in nature. *Monday* v. *United States*, *supra*, *Botta* v. *Scanlon*, 314 F.2d 392, 393 (2d Cir. 1963). Unlike the criminal tax statutes which are designed to punish certain proscribed conduct, personal liability under Section 6672 is imposed as a collection device. Hence, it is not necessary that specific intent to defraud be proven in order to establish willfulness under Section 6672. *Monday* v. *United States*, *supra*; *Bloom* v. *United States*, 272 F.2d 215, 223 (9th Cir. 1959), cert. denied, 363 U.S. 803 (1960). The criminal tax decisions such as *Bishop* v. *United States*, 412 U.S. 346 (1973) are therefore not controlling precedents.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

NOVEMBER 1978

☆ U. S. GOVERNMENT PRINTING OFFICE: 1978 276532 178